BRUNEI REPORT

Kuan Kwai Choi v Ak Zaidi bin Pg Metali

HIGH COURT (BRUNEI) — CIVIL SUIT NO 175 OF 1990
ROBERTS CJ
12 SEPTEMBER 1992

Tort *— False imprisonment — Warrant of arrest authorizing arrest of plaintiff — Police inspector arrested plaintiff and detained plaintiff at police station — No action taken to produce plaintiff before the court — Whether there was 'unnecessary delay' — Criminal Procedure Code s 47*

Tort *— False imprisonment — Whether public servant can be sued in personal capacity when carrying out official duties — Succession and Regency Proclamation 1959 s 25*

A warrant of arrest dated 11 June 1990 ('the warrant') was issued by the magistrates' court authorizing police officers to arrest the plaintiff for failure to attend court and to produce the plaintiff before the court. On Saturday 23 June 1990 at about 10am, the defendant, an inspector of the Royal Brunei Police Force in the execution of the said warrant, arrested the plaintiff at her home and brought her to the police station where the plaintiff was locked up at about 10.30am. The defendant drove to the central police station where at about 11am, he wrote a minute to his superior, DSP Kamaludin who later in the day at about 4pm ordered the defendant to take the plaintiff to court. The defendant and DSP Kamaludin phoned up the court but could get no answer. Shortly before 4.30pm on the same day, the defendant signed a minute stating that he could not bring the plaintiff to court in time that day. Thereafter, the defendant had nothing further to do with the case. The plaintiff was kept in custody for 52 hours before being finally taken before the court on Monday 25 June 1990 at about 2pm. The plaintiff instituted the present suit against the defendant claiming damages for false imprisonment.

Held, allowing the plaintiff's claim with costs:

(1) There was nothing in the said warrant which authorized the detention of a person arrested under it. Under s 47 of the Criminal Procedure Code ('the CPC') it is provided that the police officer, or other person executing a warrant of arrest shall 'without unnecessary delay' bring the person arrested before the court. If a court is not sitting, or a magistrate is not available at the time when the arrest took place such circumstances may be regarded as a necessary delay. The plaintiff was arrested shortly after 10am and the magistrate should have been available for some six hours thereafter. The court found that there was unnecessary delay in

this case as no effort was made to take the plaintiff in front of a magistrate during that time. Between 10.30am and 4pm on 23 June, the plaintiff was falsely imprisoned. From 4pm onwards, DSP Kamaludin had charge of the plaintiff and could have released her. Therefore, the liability of the defendant did not extend beyond the first six hours.

(2) A public servant could be sued, in a personal capacity for tortious acts which he carried out, as part of his official duties.

(3) The amount awarded to the plaintiff must represent the annoyance which she must have felt and the adverse effect on her reputation in being wrongly imprisoned. The sum of $3,000 was therefore awarded to the plaintiff as damages for wrongful imprisonment.

[*Editorial Note*: The plaintiff's appeal against this judgment on quantum of damages vide Civil Appeal No 6 of 1993 was heard on 22 May 1993 by the Court of Appeal (Bandar Seri Begawan). The court (comprising Kutlu Fuad P, Alan Huggins Commissioner and Derek Cons Commissioner) dismissed the appeal.]

Cases referred to

1 *Tan Kay Teck & Anor v The Attorney-General* [1957] MLJ 237 (folld)
2 *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 (refd)
3 *McKee v Chief Constable for Northern Ireland* [1985] 1 All ER 1 (refd)
4 *Yaohan Singapore Pte Ltd v Teresa Oliveiro* Mallal's Digest para 2474 (refd)

Legislation referred to

Succession and Regency Proclamation s 25
Criminal Procedure Code ss 47 & 347

The plaintiff in person.
James Chiew for the defendant.

Cur Adv Vult

Roberts CJ:

Preliminary

The plaintiff, Mdm Kuan Kwai Choi, claims damages for false imprisonment against Insp Ak Zaidi bin Pg Metali of the Royal Brunei Police Force.

I take into account the fact that the plaintiff has taken this action as a litigant in person and have therefore overlooked, as far as I properly can, any defects which may appear in her pleading or in the presentation of her case.

The facts

The main facts are not in dispute. It is conceded by the defendant that, on the morning of 23 June 1990, at about 10 o'clock, the defendant went to the plaintiff's house, accompanied by two women police constables to arrest her, in the execution of a warrant of arrest which his superior officer had directed him the day before to execute.

The plaintiff's house is at No 70, Kg Anggerek, Jalan Berakas. She was shown the warrant of arrest, which has been exhibited at p 54 of the agreed bundle of plaintiff's documents ('the PLB'). The warrant authorized police officers of Bandar Seri Begawan to arrest Mdm Kuan Kwai Choi for failure to attend court and 'to produce her before the Magistrate's Court at Bandar Seri Begawan'.

The warrant of arrest was dated 11 June 1990.

When the defendant arrived and explained why he had come, the plaintiff replied that she was not at court on 11 June because she was sick. The defendant told her she must explain this to the court.

She then changed her dress and got into the police car. She was not handcuffed or restrained when she did so. She was taken directly to the police station nearest to her house, which happened to be that at Berakas.

When they got there at about 10.05am, the defendant wrote in a book, which was presumably the day/night book of the Berakas police station, that he had brought her there. She asked him if she could phone the court and speak to Insp Ibrahim. According to the plaintiff, she was told that she could not do so, although the defendant does not recall whether or not this happened.

After about 15 minutes, her belongings were taken away and she was locked up in the cells. It was then about 10.30am on a Saturday morning.

Having made provision for her to be received in the cells at Berakas, the defendant drove to the central police station where, at about 11am, he wrote a minute to his superior DSP Kamaludin, the officer who had ordered him to carry out the warrant of arrest.

He did not receive an answer to that minute until approximately 3.30pm. He went to see DSP Kamaludin at about 4pm, when he was ordered to take the plaintiff to the court. Before doing so, he and DSP Kamaludin phoned the court but could get no answer.

He concluded by writing a note, which is to be found at p 57 of the PLB to the DSP, stating that after he received the investigation paper from the DSP at 4pm he could not bring Mdm Kuan to court in time that day. He signed that minute shortly before 4.30pm and had nothing further to do with the case. He received no further verbal or written instructions which had anything to do with it. He did not himself take the plaintiff to court the following Monday. He knew nothing about how she got there or what happened to her at any time after he left her at Berakas.

The warrant

It seems possible that DSP Kamaludin may have misread the warrant which was issued by the court. The warrant does not specify any time at

which Madam Kuan is to be brought before the court, although the magistrate, in his note at p 11 of the PLB, stated: 'Warrant of arrest against the defendant. For further mention on 25 June 1990 at 2pm at Bandar Seri Begawan court.'

This understandably appears to have been regarded by DSP Kamaludin as an order to arrest the plaintiff and bring her before the court on 25 June and not as an order, which I suspect was intended, that the plaintiff should be brought before the court as soon as possible. In any event, no action was taken to enforce the warrant until the DSP gave a written instruction on 22 June to the defendant.

In that instruction to Insp Zaidi, DSP Kamaludin said 'please proceed with W/A(CC/801/90). The accused is staying at Mile 4 Jln Bks (somewhere behind ex-Malaysian High Commissioner's house). You may see AOCS Bks for assistance. Soonest'. The minute was dated 22 June 1990.

This warrant at p 54 of the PLB authorizes police officers to bring the defendant before the magistrates' court which issued the warrant. It does not provide for her detention elsewhere.

Action of the defendant

The plaintiff argues that Insp Zaidi did not comply with the terms of the warrant of arrest, when he went to her house shortly after 10am on Saturday 23 June. The warrant, she says, authorized him to arrest her and produce her before the magistrates' court, not to take her to Berakas, or to have her locked up there.

If he complied with the warrant and taken her immediately to court, she submits, there would have been no difficulty in her being dealt with by a magistrate on that day.

Instead of doing this, however, Insp Zaidi took her to Berakas police station, where he arranged for her to be received in the cells. He then returned to the central police station, to obtain further instructions from DSP Kamaludin.

There is nothing in the warrant which authorizes the detention of a person arrested under it. However, it is obvious that a warrant may be executed at a time when it is not possible for the person arrested to be brought before a court, for example, if an arrest takes place on a public holiday. In those circumstances, it would be reasonable for the necessary steps to be taken to detain the person arrested until it was possible to bring them before the court.

Section 47 of the Criminal Procedure Code ('the CPC') provides that the police officer, or other person executing a warrant of arrest shall, subject to the provisions of s 44 as to security, 'without unnecessary delay' bring the person arrested before the court which he is required by law to produce such person.

If a court is not sitting, or a magistrate is not available, at the time when the arrest takes place, I would regard this as a necessary delay. But I cannot find that there was a necessary delay in this case. The defendant was arrested shortly after 10pm and the magistrate should have been available for some six hours thereafter. No effort, however, was made to take her in

front of a magistrate during that time, as in my judgment she should have been. A warrant of arrest is a powerful expedient and must be strictly observed, as must the relevant provisions of the CPC.

Although the warrant of arrest itself contained no endorsement for the granting of bail, it is possible by virtue of s 347 of the CPC, for bail to be given by any police officer of the rank of an inspector and above. It does not appear that the defendant was familiar with this procedure, which was available to him, as was to his superior DSP Kamaludin.

As as result of this series of misfortunes, the plaintiff was kept in custody for 52 hours before finally being taken before the magistrates' court in Bandar Seri Begawan at about 2pm on Monday 25 June.

Defence

Insp Zaidi says that he was only carrying out what he was understood to be his instructions. He was armed with the warrant of arrest when he went to the plaintiff's house and, in accordance with that warrant, as he believed, he took her to Berakas police station, before he reported to DSP Kamaludin, which he did at about 11am. He got no answer until 3.30pm. By the time he was able to see the DSP, it was too late to arrange for her to be taken in front of the magistrate because there was no reply when he made a call to the court.

I find that the original arrest of the plaintiff was correct and in accordance with the warrant which had been issued by the magistrate, though the defendant's superiors were, understandably, at fault in misreading the warrant of arrest as only requiring her to be brought in front of a court on 25 June 1990. This appears to be due to the wording adopted by the magistrate rather than to any fault of the police, since the warrant did not make it clear that she should be brought in front of a court as soon as possible.

I have no doubt that she should have been taken from her house directly to the court, which issued the warrant of arrest, on the morning of 23 June. She was therefore 'falsely imprisoned' from approximately 10.30am on 23 June until 2pm or so on Monday 25 June.

Who is liable?

If it were possible to sue the Government of Brunei for the acts of all its servants, the plaintiff could, if she proved that a number of public servants had committed a tort against her, recover from the government for the actions of all of them. Since, for reasons given below, she cannot do this, she has rightly sought to bring proceedings only against the defendant. The latter will only be liable to the extent of his own actions, though the plaintiff could also have joined DSP Kamaludin as party.

If a defendant had committed an actionable wrong he is, in principle, liable for it. It is not a defence to a claim that he was acting in accordance with the instructions given to him by a superior.

Can it be said that the plaintiff remained in the custody of the defendant until 2pm on Monday 25 or did she cease to be falsely imprisoned, as a

result of the defendant's actions, when the latter handed the case to DSP Kamaludin at about 4pm on the Saturday? A

Although it is true that it was the initial mistake of the defendant which caused her detention in Berakas police station, from about 10.30am on Saturday, the evidence demonstrates that the defendant had nothing whatever to do with the plaintiff after about 4pm on Saturday 23 June.

DSP Kamaludin could, if he so wished, have granted her bail until the Monday, to attend at the magistrates' court then. It is perhaps not surprising that he did not do this, since she had failed to appear 12 days before to answer a prosecution being brought against her for falsely alleging that the husband had forged a document. B

I think that it can reasonably be said that it was only between 10.30am and 4pm, when the matter was handed over by the defendant to the DSP, that she was falsely imprisoned as a result of action taken by the defendant. Thereafter, her false imprisonment was caused by the person who had her in his charge from them onwards. This was DSP Kamaludin and not the defendant. From 4pm on the Saturday, the DSP had charge of her and could have released her rather than the defendant. C D

I have great sympathy for the defendant, who was carrying out what he thought were the orders of a superior officer. Nevertheless, I think that he erred in not taking the plaintiff directly to the court as the warrant of arrest ordered him to do. She was therefore 'falsely imprisoned' for about 52 hours, though I accept that his liability did not extend beyond the first six hours. E

Can a public servant be sued?

The inspector is sued in a personal capacity and not as a servant or agent of the Government of Brunei Darussalam. Is there anything in the law which prevents this being done? F

As he has said, both in his defence and in his evidence, Insp Zaidi was acting at all times in accordance with the orders which were given to him by a superior officer, orders which he thought he was carrying out and to which, so long as they were not illegal on the face of them, he was obliged to give effect. So when he executed the warrant, and in all his subsequent actions, he was acting as a public servant, employed as such by the Government of Brunei. G

My attention has been drawn to s 25 of the Succession and Regency Proclamation 1959, which is in these terms:

25 (1) The following principles shall be inherent in the exercise of the State functions– H

...

(b) the Sultan can do no wrong, and effect shall be given to this principle in like manner as, immediately before the enactment of the Crown Proceedings Act 1947 in England, effect was there given to the maxim that the King can do no wrong: I

Provided that provision may be made by laws enacted under the Constitution for the bringing of proceedings against the Sultan (otherwise than in his

A private capacity), or against the Government or any officer, servant or agent thereof, in respect of wrongs committed in the course of carrying on the Government of Brunei.

It has been submitted that, by virtue of the presence of this proviso, it is not possible to bring any action against the government or an officer, servant or B agent of the government, in respect of any wrongs committed in the course of carrying out government duties, until a law to that effect is enacted, which it has not been so far. Nor, it is argued, can any action be brought against a public servant in his personal capacity for any wrongs committed by him in the course of carrying on the Government of Brunei.

C I do not read the proviso in this manner. As is the case with any proviso, it seeks to vary what would otherwise be the effect of the section which it follows. What was the position in England, before the enactment of the Crown Proceedings Act 1947?

Proceedings by petition of right

D Since it is 45 years since the Crown Proceedings Act 1947 was passed, it is difficult to ascertain what the law was before that time.

It is arguable that the Crown Proceedings Act 1947, as a statute of general application, came into force in Brunei on 25 April 1951, by virtue of Ch 2. If this was so, I do not think that it is still in being in Brunei, since E it is clearly the intention of s 25 of the Proclamation that the 1947 English Act should not be in force, whether this means that the Act was repealed by implication or was not thought to be in force at all.

The maxim that the King can do no wrong meant that it was not, at common law, possible to bring any proceedings against the Crown. As a F remedy for this, the system of issuing the Crown's permission to use, or fiat, was devised. This allowed parties to bring proceedings against the Crown for certain actions of its servants. It was a cumbersome procedure, but provided a remedy in most cases.

This system, however, meant that a petition of right had first to be presented and the appropriate minister, on behalf of the Crown, had to G signify that the action might proceed. There was, however, a clear rule at common law that, because the King could do no wrong he could not authorize a wrong, no fiat would be issued to authorize any action in tort against the Crown.

This was thought to be unfair, since it would have left a victim with no H relief, as he could not sue the Crown in tort. This gap was sought to be filled by taking action against the public servant responsible personally and hoping that the Crown would stand behind him. This it invariably did, if satisfied that the public servant had been acting in the course of his duty as such.

I I would be very reluctant, in the absence of the clearest words, to interpret a statute in such a way as to leave a citizen with no form of relief. As the plaintiff in this action submitted, it would not make sense if a private doctor who was negligent could be sued, whereas a government employed doctor, who did the same in a government hospital, would be immune.

Similarly, she submitted, a driver who breaks a pedestrian's leg, should be capable, if negligent, of being sued whether he was driving a private car or a government vehicle while on duty.

It was said for the defendant that a person will not be left without recourse, since an ex gratia payment can be made by the Minister of Law. However generous the latter may be, this cannot be as efficacious, in the eye of a potential litigant, as recourse to an independent body. The Minister cannot be said to be detached, since he is a part of the public service, against a member of which the claim is made. He can, in the end, offer an ex gratia payment which may be less than the citizen believes himself entitled to get and the latter must accept it, since no other remedy is open to him. In other cases, in which the Minister believes the public servant to have been in the right, he may make no offer at all, though the member of the public may believe otherwise.

It is worth noting that a litigant can sue the government in tort in most countries, among them Malaysia, Singapore, Hong Kong, the United Kingdom and Australia, by virtue of laws which authorize this. Such an action would have been novel in 1959 in some countries but it is so no longer.

Before the Crown Proceedings Act 1947, an injured party could sue an individual public servant, though not the Crown, in tort, whether or not the wrong was committed in the course of his duties as a public servant. I do not think that such a right should be taken away unless this is clearly stated.

The proviso follows a subsection which preserves existing rights. These included the right to sue an individual for his own tort, though not to sue the government, even if he was acting officially at the time.

When the proviso refers to wrongs committed in the course of carrying on the Government of Brunei, I think that it is referring to only those torts for which the Crown could not be held liable before 1947, and not to all acts by the Crown. If the wider reference had been intended, some phrase such as 'acts or omissions' would have been used, rather than the word 'wrongs', which, in its context, must in my opinion, have been referring to tortious wrongs only.

I can see no objection to a defendant being sued, in a personal capacity, for tortious acts which he carried out, as part of his official duties. If it is sought to make the government directly liable in actions other than tort, the procedure of the petition of right must be used. It is, of course, for the government to decide whether to pay any damages awarded against a public servant or whether it will leave him to do so himself.

I find that there was false imprisonment by the defendant for a period of six hours. This will entitle the plaintiff to damages, which I will now assess.

I have already found that the plaintiff was illegally detained from approximately 10.30am until 4pm on Saturday 23 June 1990 and it is upon that unlawful detention, rather than a fuller period of 52 hours during which she was detained in Berakas police station, that I base the damages awarded to her though it is never an easy matter to attempt to transmit into monetary terms an inference with a basic freedom.

I have been referred by Mr Chiew to the case of *Tan Kay Teck & Anor v The AG.*[1] Whyatt CJ comments at p 240, on the question of damages for false imprisonment as follows:

A It was pointed out by Scott LJ in *Dumbell v Roberts* [1944] 1 All ER 329 that where a person has been wrongfully arrested and detained, it is in the public interest that sufficient damages should be awarded in order to give reality to the protection afforded by the law to personal freedom. Furthermore, as Lawrence LJ observed in *Walter v Alltools Ltd* 61 TLR 39, a false imprisonment does not merely affect a man's liberty; it also affects his reputation.

B

I do not think that these objects, if they are proper ones and I think they are, can be achieved by the award of nothing more than a nominal amount. It must be an amount which represents, so far as it can, something of the annoyance which a private citizen must necessarily feel if she is falsely imprisoned by a police officer.

C The plaintiff's reputation was adversely affected as a result of a wrongful imprisonment. An article was published about her in the *Borneo Bulletin* on 30 June, which, although it is factually correct, refers to her arrest by the police and her detention in the Berakas police station for two days. Similarly, although she did not produce them, she says that she was phoned or spoken

D to by a number of friends who had heard of her arrest. It would indeed be surprising if they had not done so. There were, however, no aggravating circumstances.

In the *Tan* case,[1] one of the petitioners who was five months pregnant, was forced to go to a police station, wearing night pyjamas. They were kept in the police station for several hours before being released on bail. In this

E instance, there was a warrant for the arrest of the plaintiff. As I have found, the defendant went wrong, not in arresting the plaintiff, but in not acting in accordance with that warrant. He took her to the Berakas police station, as he should not have done, and left her there while he sought further instructions. There is no suggestion that at any time he subjected her to any

F oppressive, malicious or insulting conduct.

In the *Tan* case,[1] where both of the petitioners were deprived of their liberty for about six hours, the sum of RM1,000 was awarded. As this was a 1957 case, some rough equivalent to the present value of money could be obtained by multiplying the figure of damages by ten.

In *Shaaban & Ors v Chong Fook Kam & Anor*,[2] there was an award of

G RM2,500 to the plaintiff for approximately nine hours false imprisonment by the police.

Delivering the judgment of the Privy Council, Lord Devlin said that he thought the sum of RM2,500 for each plaintiff seemed extremely high. He added that the court was not confined to awarding compensation for loss of liberty and for physical and mental distress and could mark any departure

H from constitutional practice by exemplary damages, though these did not have to be large. I do not find anything which would justify the award of exemplary damages.

Shaaban[2] is another old case. Roughly, the present equivalent might be as much as RM15,000 though the Privy Council thought this was excessive.

I It is not said to what level the figure was subsequently reduced.

The third case *McKee v The Chief Constable for Northern Ireland*[3] in which the plaintiff was detained for approximately 18 hours in a Northern Ireland police station. He was awarded a sum of £500 in damages or B$1,500, which nowadays would probably amount to about B$3,000.

In *Yaohan Singapore Pte Ltd v Teresa Oliveiro*,[4] the plaintiff was wrongfully arrested by a security officer in a supermarket in Singapore and was detained in custody for approximately one and a half hours. The plaintiff was awarded damages of S$2,500, the district judge being satisfied that there was a wrongful arrest by the security officer. In this instance, the original arrest was lawful, but the subsequent conduct of the defendant, in placing her in Berakas police station was not.

After about 4pm on the Saturday, the defendant was no longer in control of the plaintiff. Even if he had wished to do so, he would not have been in a position to release her, though I think that DSP Kamaludin could have done so.

Had I been of the view that the defendant was responsible for the whole of the wrongful detention of Madam Kuan, I would have awarded to her a larger sum, perhaps B$10,000. Taking into account the unusual circumstances, that the defendant was only responsible for her detention for a limited period, I think that she ought to be awarded a sum which is more than nominal and will to some degree compensate for her wrongful imprisonment for about six hours. I award the sum of B$3,000 as damages to the plaintiff.

I also order that the defendant shall pay the costs of the plaintiff, which costs shall be taxed if they are not agreed.

Order accordingly.

Reported by Yap Foo Ken